In the Supreme Court
of the
United States

October Term, 1956

No. [redacted] 893

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin,
Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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REPLY TO RESPONDENT'S STATEMENT OF FACTS, PREFACE TO ARGUMENT, AND ARGUMENTS.

A full reply might be made in two sentences:

Adjectives are no competent answer to facts.

Oversimplification is not a fair or valid substitute for reasoned opposition to a petition for a writ of certiorari in a death case.

Having set forth the facts in his Petition for a Writ of Certiorari, Petitioner will not unduly burden

the record by repeating them here. However, it is necessary to call this Court's attention to certain incorrect statements and half truths contained in Respondent's brief. Petitioner must also except to and controvert Respondent's "Preface to Argument" (Resp. Opposition to Petition for Certiorari, pp. 6-7), with its grave, but unfounded, charges. And it should be noted here that Respondent does not cite one specific instance of alleged scurrility or misleading statements. While neither Petitioner nor his counsel desire to engage in this unbecoming quibbling with opposing counsel, it must be patent to the Court that the Petition for Certiorari is not, as Respondent contends, scurrilous or misleading; and this the Court can determine for itself. Rather than engage in the indignity of stressing that if misleading statements appear in the moving papers before the Court, they abound in Respondent's brief, Petitioner is content to refer this Court to the record to sustain his position and will specifically set forth herein only those misstatements which should be before the Court in its determination of the matter. That some such misstatements must be noted is emphasized by the fact that this is a capital case which will be laid to rest, once and for all, by the decision herein, upon which decision the very life of Petitioner depends.

On the other hand, Respondent (Resp. Opposition to Petition for Certiorari, p. 7) promises to "seek to correct a few of the most glaring of [Petitioner's] [alleged] misstatements." But he fails to do so; and, once again, nowhere does Respondent mention or point

to one instance of his asserted "intemperate abuse of Federal judges and persons connected with Petitioner's prosecution."

Such claims should not be lightly made; and they have the effect of eliminating Respondent's brief as an aid to the Court. Objectively questioning the propriety of a judge hearing and deciding a case, or vigorously presenting, in good faith, a charge of fraud against the prosecutor and his uncle-in-law should lead neither to attacks upon this condemned Petitioner nor to the grossly wrongful characterization of the contents of his petition.

While it may be collateral, reference should be made to the statement at page 3 of Respondent's brief to the effect that custody of the Petitioner was transferred to the Marshal. Technically this may have been correct; but it was, at best, a constructive custody which was so transferred; and, as the record abundantly shows, petitioner's actual and physical custody remained with the Respondent, with the consequent unconstitutional restrictions upon Petitioner's opportunity to prepare for the hearings in the District Court.

Furthermore, at page 2 of his brief, Respondent usurps the function of this Court when he states that a hearing was ordered "on the question of fraud and collusion in the settlement of the record." As clearly shown by the Petition for a Writ of Certiorari, the scope of the hearing ordered by this Court in 350 U.S. 3 is at the very heart of the present appeal to the

Court. If further proof of this statement is needed, all that is required is a reading of the opinions of Judges Lemmon and Denman on denial of the petition for a rehearing (239 Fed. 2d 205 at 221 and 223), said opinions being set out in the Appendix to the Petition herein.

As he has throughout the instant proceedings, Respondent makes the misleading claim that Petitioner does not "attack the sufficiency of any findings of fact" made by Judge Goodman. While this may, in a sense, be literally true, it is an attempt to mislead the Court into thinking that Petitioner does not except to or question the propriety of those findings, which he most emphatically does. True it may be that upon the evidence before it—on the very restricted evidence which was admitted by the District Court—the findings may be said to be "sustained"; however, had that Court admitted the evidence which it prejudicially and erroneously refused, it is Petitioner's contention that the proof would have compelled findings in his favor.

As one example: at page 5 of his brief, Respondent stresses the fact that it was found that Fraser was not a discredited reporter from another state and that he had not at any time been discharged for incompetency or drunkenness. Yet the Court, as Petitioner has shown in his Petition, refused to order the production of evidence in support of those allegations in the petition for habeas corpus when it refused to arrange for the production of Judge Paonessa, counsel for Petitioner having made an offer of proof to the

effect that he would show by Judge Paonessa that he had discharged Fraser for incompetency and drunkenness.

Similarly, the Court erroneously, and to Petitioner's prejudice, excluded evidence proferred to show that Fraser was inebriated at the very time when he was engaged in preparing the transcript here attacked. Petitioner sought an order to show Fraser's arrest record, offering to prove thereby that he was arrested for inebriety during that period. The order was denied, and the evidence thereby rendered unprocurable. Further, petitioner sought to procure the testimony of Mrs. Eva Hoffman, either in person or by deposition that she knew of her own knowledge that Fraser was, during the time of the preparation of the transcript, so inebriated as to be incapable of performing the work. Another denial. Additionally, petitioner sought an order to produce Fraser's hospital records which, although pertaining to an "illness" in 1953, would (as Petitioner offered to prove) have shown a long history of addiction to alcohol, existing at the time in question. Again, the familiar pattern of denial. And in view of this pattern and considering the one-sided evidence which the District Court did permit to be introduced, Petitioner cannot in good conscience say that the evidence does not support the findings made. But he can, and most vigorously does, maintain that the findings are erroneous because the District Court prejudicially and erroneously refused to admit proper proof of the allegations in the petition for habeas corpus.

Respondent nobly attempts to convince the Court that the hearings were full and fair, conducted without bias. He urges that the charges of bias and prejudice were "fully reviewed by the United States Court of Appeals and that Court's determination that petitioner had a full and fair hearing is correct." But Respondent carefully avoid the harsh language used by Judge Lemmon, to which reference is made in the Petition for Certiorari (pp. 26-28). Nor does he even mention the fact that the Court of Appeal's decision against Petitioner was by a mere two-to-one vote. Likewise does Respondent avoid any reference to the vigorous opinions of Judge Denman.

The questions as stated by Respondent at page 2 of his brief, oversimplified as they are, are not a fair substitute for those set out in the Petition for a Writ of Certiorari (pp. 6-8), which Petitioner conscientiously tried to put as briefly and succinctly as could be done. It is for reasons such as this that, although believing his position is fairly and convincingly put in the Petition for a Writ of Certiorari, that Petitioner has felt impelled to file this Reply to Respondent's Opposition.

ARGUMENT.

I. THE IMPORTANT CONSTITUTIONAL QUESTIONS AS TO THE ASSAILED CONDUCT OF THE PROCEEDINGS, THE QUALIFICATIONS OF JUDGE GOODMAN, AND THE QUESTIONED FAIRNESS OF THE APPELLATE COURT SHOULD BE DETERMINED BY THIS COURT.

First let it be said that Petitioner does not raise in his Petition for a Writ of Certiorari any issues which were not presented to the Circuit Court of Appeals. Rather than labor the point that Petitioner did in fact attack the propriety of the District Court's findings in the Court of Appeals, Petitioner here makes reference to pages 26-31 of his opening brief in the Circuit Court, where, amidst a lengthy discussion, he says:

> "Clearly, appellant lost his case solely because he was prevented from proving his charges."

Reference is also made to another detailed discussion at pages 1-3 of his closing brief in the Circuit Court where it is stated, in part:

> "This statement . . . seemingly is calculated to convince this Court, in effect, that because, so respondent claims, appellant does not challenge the District Court's findings as *such*, the appealed order may be affirmed without further consideration. But appellant's procedural attack upon the order is even more fundamental than would be an attack upon its findings . . ."

See, also, pp. 20-26 of Petitioner's same closing brief, where this Petitioner clearly attacks the sufficiency of the findings now under discussion, on the same grounds as herein.

This Court can see for itself whether there was an attempt to challenge the propriety of the findings that there was no fraud or collusion by the prosecutor, the substitute reporter or the Court, or the finding that the Court reporter transcribed the notes of the deceased reporter with fairness and accuracy. Petitioner's allegations of fraud and inaccuracy were, and are, at the core of this present proceeding, and, as the Court knows, if Respondent does not, are properly brought here for review.

The answer to Respondent's contention that Petitioner did not object to any of the questions put to witnesses Fraser or Burdick has been so frequently and carefully set out that Petitioner is reluctant to repeat it here. Yet Respondent's urging of the point makes such repetition necessary; and the answer is merely this: the District Court had ruled as to what evidence it would and, more importantly, what it would not, hear. (*Cf. Remmer v. United States*, 350 U.S. 377.) Counsel was hardly in a position, as any trial counsel can appreciate, to risk the judicial consequences of pressing the matter further.

Respondent also, absent any evidence in the record—indeed, contrary to the record—chooses to speculate as to why Petitioner's expert witness was not offered; and Respondent's untrue and unsupported guess on this subject is refuted by the affidavit of Petitioner filed with the District Court in conjunction with his seeking of declaratory relief. That sworn statement shows that the expert refused to testify unless he were paid an additional sum, and that Petitioner's funds

At page 10 of the Opposition to Petition for Certiorari, Respondent asserts that "Petitioner raises a false issue in his contention that the District Court precluded him from offering arrest records and hospital records concerning the substitute reporter." One answer to this is that Petitioner sought the production of the records, rather than formally offering them in evidence, for the simple reason that they could not be produced without such an order (as appears in the record) and that, not being able to produce them, Petitioner obviously could not offer them. But, further, if this can in truth be said to be a "false issue," perhaps Respondent can explain to the Court why the District Court made findings on these points, without production or proof of the records.

To make the claim, as Respondent does, that these records would not necessarily have a bearing on the issue of fraud or collusion is to ignore the true situation. It was shown without contradiction that the prosecutor procured Fraser to do the transcription and that Fraser was related to him—was his wife's uncle. It is a fair and reasonable assumption from the evidence that there was a close association between them. It was further shown that Fraser, as the instance of the prosecutor, was paid far in excess of the ordinary statutory fee for such work. If, in fact, Fraser was shown to have been intoxicated while working on the transcript, it is also fair to assume that such fact was known to Mr. Leavy and, it is submitted, might well furnish the basis for any inference of fraud and collusion. Had Petitioner been permitted to estab-

lish these facts, surely it cannot be said to be either proper, usual or customary under all of the circumstances for the prosecutor to employ a reporter, his own uncle-in-law, known by him to be habitually addicted to the use of alcohol and to pay him at an excessive rate. Petitioner was entitled to introduce his evidence giving rise to an inference to fraud and collusion and was entitled to the benefit of that inference.

II. PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE UNIQUE AND AD HOC METHODS OF THE CALIFORNIA COURT IN PREPARING, SETTLING AND APPROVING, IN THE ABSENCE OF PETITIONER AND OVER HIS OBJECTION, THE REPORTER'S TRANSCRIPT ON THE MANDATORY APPEAL IN A DEATH CASE.

Regardless of any philosophy or policy concerning the desirability of eliminating repetitious petitions, that situation is not presented here. The denial of certiorari in 340 U.S. 840, denying review of the decision of the Supreme Court of the State of California in *People v. Chessman*, 35 Cal. 2d 455, does not have the effect contended for by Respondent of approving the method used by the State Courts in procuring a transcript on appeal. At that time Petitioner's state remedies had not been exhausted, and this Court could not have acted, had it been so inclined. It is also worthy of note that the District Court did not even purport to dispose of the matter on the ground that the habeas corpus petition before it was "repetitious". It simply ignored the question; and if in doing so it is

held to have exercised a "judicial discretion," it is indeed a novel sort of judicial discretion.

That the Court of Appeals did not expressly determine in *Chessman v. Teets*, 221 Fed. 2d 276, that Petitioner had waived his right to counsel at the proceedings for the settlement of the transcript is readily apparent, and the talk of necessity for an "end to litigation" by Respondent circumvents the issue. It was vital that Petitioner be present at those proceedings, inasmuch as he was the one with a knowledge of the facts, the one who knew what evidence was available to support his position. He was not permitted to be present, nor was there counsel to represent him. These proceedings were a part of the State judicial process—a part of the due process of law set up by the State—in which Petitioner should have been afforded his full constitutional guarantees.

In the earlier holding in 221 Fed. 2d 276, the Court of Appeals, holding that there had been a waiver of counsel, clearly had reference to such a waiver at the trial. In its more recent decision, that same Court "adheres to the basic premise . . . that the proceedings in which the transcript was certified were a part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained"; and a waiver at one point is not a waiver as to all subsequent stages. The decision of the State Court not being *res judicata* (*Reece v. Georgia*, 350 U.S. 85), the statement by the California Court in *People v. Chessman*, 35 Cal. 2d 455, 467, is not of binding effect; moreover, it should be noted that the Court there said:

> "In the trial court he was repeatedly offered and refused counsel, and he has refused to accept the appointment of counsel to represent him before this court . . ."

The Court did not, and could not, say that he was offered counsel at the settlement proceedings; the question was not even mentioned by the California Court.

Two other points in respect of this so-called waiver must be noted: first, it was not a voluntary waiver, in the sense of an affirmative act by Petitioner, but rather a constructive waiver, involuntary and effected by the Court; second, and even more telling, is the fact that Petitioner was not aware that it would be necessary for him to have counsel, inasmuch as the prosecutor had sworn that he, Petitioner, would be produced in Court (see p. 32, Petition for Writ of Certiorari), and Petitioner had motioned the Court to be produced. (Id., pp. 32-33.) As there noted, the trial Court, in charge of the proceedings, itself admitted that Petitioner should have had counsel.

Respondent concedes, as he must, that when a state supplies an appellate process for review of a criminal conviction, such processes must not be discriminatory. But to say that the procedure used in this case "was and is the law of California" is quite another thing. Respondent has not and, it is submitted, cannot, cite any authority for the proposition that this has always been the law in California. Indeed, the California Supreme Court itself recognized the uniqueness of the situation and, in effect, invented an equally unique

tioner, and *only* to him. As argued in the Petition for Certiorari (p. 52), petitioner was thereby deprived of rights mandatorily afforded and in practice granted to all others in his situation in California. Even apart from its infirmity under the Due Process Clause, the procedure must also fall for its failure to provide Equal Protection to Petitioner. As Mr. Justice Frankfurter has stated in the recent case of *Sikes v. Alabama*, 1 L.Ed. 2d 246, 251:

> ". . . the Due Process Clause of the Fourteenth Amendment has placed limitations upon the discretion, unbridled, for all practical purposes, that belonged to the states prior to its adoption, and, more particularly, confines their freedom of action in devising criminal procedures."

And it matters not what other states may afford by way of appellate review, nor what was the practice at common law. It must be assumed that within those other states, such laws as they have are applied equally to all similarly situated. What is pertinent is that the constitution and laws of the State of California have established an appellate procedure uniformly followed in the Courts of that state, save in this one case.

Petitioner's contention is, and was, that by reason of the procedure adopted by the state Courts at the settlement proceedings, those proceedings were so constitutionally lacking as to fall. If Respondent's position were to be followed, then Due Process has lost its vigor and the intent of the framers of the Constitution has been frustrated. It offends the sense of fair

play and justice inherent in that honorable document to conceive of a hearing—upon which a man's life depends—where evidence is taken and issues of fact determined, with the defendant neither present in person nor represented by anyone in his behalf, at the same time when his adversary—the State—is thoroughly and ably represented. Denial of counsel, as a violation of due process, creates an infirmity so vital that it is not waived in this case by any earlier omission to raise the issue. The unconstitutionality goes so deep that it permeates the entire proceedings and, no matter when the issue is raised, vitiates them, by reason of the fact that the Court acted without jurisdiction. Moreover, every presumption is indulged against the waiver of fundamental rights (*Glasser v. United States,* 315 U.S. 60), and Respondent here has not even attempted to overcome that presumption.

CONCLUSION.

This Petitioner has spent more time under sentence of death than any condemned man in this Nation's 180-year history; on July 3, 1957, he will have been doomed for nine long calendar years. The State cannot return those years, whatever wrong may have been done to Petitioner; but it can accord to him his rightful procedural due process. As this Court will have noted, Petitioner is not asking that his judgments of conviction be reversed; he is seeking only a chance, in the State Courts, for a full, fair and final hearing, wherein he may prove the charges that he has made

that the record on appeal in the State Courts is materially and fatally and prejudicially incorrect.

Wherefore, Petitioner submits that the Writ of Certiorari issue and that the holdings and relief prayed for at pages 72-73 of his Petition for Writ of Certiorari be granted.

Dated, March 22, 1957.

Respectfully submitted,

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